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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re DENNIS B. ANDERSON on Habeas Corpus.	A124325 (San Mateo County Super. Ct. No. SC14251)

Dennis B. Anderson is serving two concurrent sentences of 15 years to life, plus two years for the personal use of a firearm, having been convicted of two counts of second degree murder (Pen. Code §§ 187, 12022.5).[1] Incarcerated since 1984, he challenges the April 3, 2008 decision of the Board of Parole Hearings (Board) finding him unsuitable for parole and finding that it is not reasonable to expect that he will be granted parole at a hearing held before 2011. The Attorney General responds that Anderson is a current risk to public safety based upon his commitment offense, his lack of insight into the causative factors of his behavior, and his lack of alcohol abuse programming.

When reviewed according to the standards recently enunciated by the California Supreme Court in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the evidence does not support the Board's decision. We conclude, however, that Anderson's suitability for parole should be evaluated in accordance with those decisions in the first instance by the Board. Accordingly, we will grant the petition to the extent that we will remand the case to the Board for

[1] Further statutory references are to the Penal Code, unless otherwise indicated.

reconsideration within 60 days of the finality of this decision. We express no opinion regarding Anderson's suitability for parole.

APPLICABLE LEGAL STANDARDS

Lawrence, supra, 44 Cal.4th 1181 and *Shaputis, supra,* 44 Cal.4th 1241 articulated the legal principles governing parole decisions and appellate review.

"[P]arole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*Lawrence, supra,* 44 Cal.4th at p. 1204.)

"[T]he Board is the administrative agency within the executive branch that generally is authorized to grant parole and set release dates. (§§ 3040, 5075 et seq.) The Board's parole decisions are governed by section 3041 and title 15, section 2281 of the California Code of Regulations (Regs., § 2230 et seq.). Pursuant to statute, the Board 'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect to their threat to the public* . . . .' (§ 3041, subd. (a), italics added.) Subdivision (b) of section 3041 provides that a release date must be set 'unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. (Italics added; [citation omitted].)'

"Title 15, section 2281 of the California Code of Regulations sets forth the factors to be considered by the Board in carrying out the mandate of the statute. The regulation is designed to guide the Board's assessment of whether the inmate poses 'an unreasonable risk of danger to society if released from prison,' and thus whether he or she is suitable for parole. (Regs., § 2281, subd. (a).) The regulation also lists several circumstances relating to *unsuitability* for parole—such as the heinous, atrocious, or cruel nature of the crime, or an unstable social background; and *suitability* for parole—such as

an inmate's rehabilitative efforts, demonstration of remorse, and the mitigating circumstances of the crime. (Regs., § 2281, subd. (d).) Finally, the regulation explains that the foregoing circumstances 'are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.' (Regs., § 2281, subds. (c), (d).)" (*Lawrence, supra,* 44 Cal.4th 1201-1203, fns. omitted.)

"[T]he circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] . . . [¶] [A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence, supra,* 44 Cal.4th at pp. 1212, 1214, italics in original.)

We review the Board's decision under the "some evidence" standard. *Lawrence* and its companion case, *Shaputis,* resolved "a conflict among the Courts of Appeal regarding the proper scope of the deferential 'some evidence' standard of review set forth in *In re Rosenkrantz* (2002) 29 Cal.4th 616 [128 Cal.Rptr.2d 104, 59 P.3d 174] (*Rosenkrantz*), and thereafter applied in *In re Dannenberg* (2005) 34 Cal.4th 1061 [23 Cal.Rptr.3d 417, 104 P.3d 783] (*Dannenberg*). Specifically, . . . whether a reviewing court focuses upon 'some evidence' of the core statutory determination that petitioner remains a current threat to public safety, or merely 'some evidence' that supports the

[Board's] characterization of facts in the record." (*Shaputis, supra,* 44 Cal.4th at p. 1254.)

Accordingly, "the determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes. (*Dannenberg, supra,* 34 Cal.4th at pp. 1083-1084, 1095.) Nor is it dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense. Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. (*Rosenkrantz, supra*, 29 Cal.4th at p. 682.)" (*Lawrence, supra,* 44 Cal.4th at p. 1221.)

Thus, "the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Lawrence supra,* 44 Cal.4th at p. 1221, italics in original.)

Significantly, *Lawrence* also explained that the Board's or Governor's decision, and our review, requires "more than a rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at pp. 1210-1211, 1227.) The Attorney General argues that the Board need not articulate a nexus if the Board relied on multiple factors. We agree with Anderson

that the requirement "logically extends to all facts upon which the [Board] relied to deny parole." (*In re Ross* (2009) 170 Cal.App.4th 1490, 1513, fn. 3.)[2]

THE RECORD AND THE BOARD'S DECISION

We turn to an examination of the record in light of the "some evidence" standard as clarified in *Lawrence* and *Shaputis*. As the parties are familiar with it, and, in light of our disposition, we need not recite it in exhaustive detail. (*People v. Garcia* (2002) 97 Cal.App.4th 847.)

1) Suitability factors

The Board generally acknowledged the factors favoring suitability.[3] Born in 1946, Anderson was raised in an economically and socially stable family environment. He had a head injury as a child, and thereafter suffered chronic headaches. He graduated from the University of California at Berkeley and Hastings Law School, passed the California State Bar Examination in 1971 and was a practicing attorney until the months before the offense. He had no prior criminal history.[4] He was married and divorced prior to his marriage to the victim. He now is on good terms with his first wife and their children.

He had been steadily employed in prison, received consistently laudatory reports, including for his work with other inmates. He designed Braille courses for the prison and works tutoring blind inmates in Braille. He is an active member of the Catholic ministry

[2] We also reject the Attorney General's argument that the allegations of Anderson's petition did not encompass this challenge to the Board's finding. The challenge was implicit in the petition, which cited *Lawrence, supra,* 44 Cal.4th 1181, and it was framed by our order to show cause. (*In re Lewis* (2009) 172 Cal.App.4th 13, 27.)

[3] Anderson argues that the Board failed to consider whether he committed the crime as a result of significant stress in his life. (*Rosenkrantz, supra,* 29 Cal.4th 679.) Given our disposition today, we need not address this argument.

[4] At the hearing, questioning from the district attorney established that Anderson had been fired from a law firm prior to the murders, and that he had slashed tires on the car of one of the victims. The prosecutor suggested that Anderson had not been forthright in his most recent psychological evaluation, which did not mention these facts. Anderson responded that he had testified to them at his trial, that the most recent evaluator had told him that he had reviewed his file where the information was available, and that he had not been asked any questions to elicit the information.

to prisoners. He assisted in the establishment of an asset planning training program designed primarily for prisoners suffering from AIDS. He set up a hospice program. His psychological reports since 1994 have consistently found him to be of low risk. He has bipolar illness, which was not diagnosed until he entered the California Department of Corrections and Rehabilitation. He has participated extensively in programs directed to the successful management of that disorder which is in remission. The psychological report for the April 3, 2008 hearing states: "He cites [to] 'minor instability' five years ago," and that "he has been entirely symptom-free for five years." He has detailed parole plans, which are explicitly designed to include relapse prevention of his bipolar illness. He has the financial, housing, and emotional support of family members. He is employable and has specific employment plans.

He has had only one Rules Violation Report,[5] a "115" in 1989 for hoarding medication as part of a suicide attempt.

2) Unsuitability factors

The Board based its finding of unsuitability on the commitment offense, Anderson's lack of insight into the causative factors of the crime, and his lack of alcohol programming, noting that he was "under the influence of alcohol at the time of this commitment offense."

Anderson does not dispute the record concerning the facts of the offense. The Board adopted the fact statement in our opinion in *People v. Anderson,* A077982, filed October 9, 1998, [6] as follows:

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[5] This form is used to document "misconduct . . . believed to be a violation of law or is not minor in nature." (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

[6] As we explained in that opinion, Anderson "was originally tried and convicted in 1985 of two counts of second degree murder. In April 1995, his federal petition for habeas corpus was granted on the ground that he was incompetent at his first trial." (*People v. Anderson, supra,* A077982, p. 1.) He was retried. The jury, following the guilt phase of trial, convicted Anderson of two counts of second degree murder. The jury also found true an enhancement allegation, with respect to each count, that he was personally armed with a firearm pursuant to Penal Code section 12022.5. The jury further found that Anderson was sane at the time of the murders. The court sentenced

"[Anderson], after a rocky courtship, became engaged to Karen Stoker on September 18, 1984, and they married on September 29, 1984. On October 10, 1984, they left for a honeymoon trip to Washington, D.C., New York, and Paris. During the honeymoon, Karen realized she had made a mistake, and told [Anderson] she was still in love with Donald Mason, [whom] she had also been dating for several years, and wanted to annul the marriage and marry Mason. She also compared [Anderson's] lovemaking unfavorably with Mason's. [Anderson] was very hurt, but agreed. On October 17, 1984, they flew home and met with an attorney to discuss the legal arrangements.

"On October 19, 1984, [Anderson] went to Karen Stoker's house to pick up some of his belongings. Donald Mason was also present, along with Karen Stoker's children, and her father. [Anderson] went to the laundry room, where he loaded his shotgun, put some spare shells in his pocket, returned to the kitchen door and shot Donald Mason at close range in the hand and chest. [Anderson] chased Karen Stoker outside, and beat her head with the butt of the gun. He reloaded the shotgun with the spare shells from his pocket, and shot Karen in the back as she lay unconscious in the driveway.

"[Anderson's] primary defense was that he had committed the killings in a dissociative state and did not have the intent to kill. He testified in his own defense describing the killings which he only partially recalled, and his experience of strobe light effects, and the sense of watching himself, and having disconnected thoughts. He also offered the testimony of family members, friends and numerous expert witnesses concerning his childhood history, including a traumatic head injury, bouts of depression, and suicidal thoughts triggered by failed relationships with Karen, and another woman."

The Board found that Anderson lacked insight into the murders, noting that he was using "his bipolar illness as the sole excuse for causing these murders." The Board noted that "[t]here are a lot of people out there with mental illnesses, a lot of people with bipolar disease, but they don't kill people. One of the things that you need to take a look

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Anderson to two concurrent terms of fifteen years to life, and two years for the section 12022.5 enhancement allegations.

at and we want you to take a look at is . . . what is it in you that specifically triggered that mechanism."

As Anderson correctly argues, this finding is not supported by "some evidence." Other than a citation to the entirety of the 127-page hearing transcript and the Board's decision, the Attorney General cites no evidence to support the Board's finding of lack of insight. The record establishes that Anderson's bipolar illness was undiagnosed, out of control, and exacerbated by his conceded self-medication with alcohol at the time of the crime and in the months preceding it. All of the psychological reports in the record support Anderson's argument that he recognizes that while diagnosed with dependant personality disorder and bipolar disorder, the responsibility for the murders is his alone, and he has taken advantage of every resource available within the prison system to identify what prompted him to murder and to insure that it will never happen again.[7]

Another ground for the Board's decision was its finding that Anderson was under the influence of alcohol during the commission of the offense and needed further programming related to his prior abuse of alcohol. This finding also is not supported by "some evidence." To the contrary, all of the evidence before the Board established that Anderson's alcohol abuse in the months preceding the murders, conceded by him, was secondary to his bipolar condition. Contrary to the Attorney General's argument, the record establishes that Anderson understood that he had used alcohol to self-medicate, understood how to prevent himself from doing so in the future, and had detailed, extensive parole plans which included programs precisely addressed to that concern. Anderson explained that he stopped attending Alcoholics Anonymous meetings because the sponsor stopped participating and the inmates were there only for the cookies. The Board acknowledged that this institutional problem had been reported by others.

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[7] Anderson argues that the Board also erroneously suggested that he lacked remorse for the crimes and unlawfully turned the alleged absence of a suitability factor (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3)) into a factor of unsuitability. We need not address the latter argument because, to the extent that such a finding may be implied, it is not supported by "some evidence." As Anderson correctly argues, the record fully supports the fact that he is and has been remorseful.

Therefore, on this record, the sole remaining factor potentially supporting the Board's decision is the crime itself. As we stated in our order to show cause, the Board reached its decision in this case prior to the decisions of our Supreme Court in *Lawrence* and *Shaputis.* The Board articulated no nexus between its statement that "the offense was carried out in a manner which demonstrates exceptionally callous disregard for human suffering" and its perception that Anderson remains a current dangerous threat to public safety if released. Given Anderson's apparent rehabilitation and the static, unchanging circumstances of the crime, the decision to find Anderson unsuitable for parole cannot stand.

Anderson also challenges the Board's finding that it was unlikely he would be found suitable before 2011. Anderson is correct that, contrary to then applicable law (§ 3041.5, subd. (b)(2)), the Board failed to articulate the basis for its finding, and this failure independently warrants a reversal of that portion of the April 3, 2008 decision.

CONCLUSION AND DISPOSITION

The writ of habeas corpus is granted to the extent that on or before 60 days from the issuance of the remittitur in this case, the Board of Parole Hearings is ordered to vacate its April 3, 2008 decision "In the matter of the Life Term Parole Consideration Hearing of: Dennis Anderson" and to hold a new parole consideration hearing in accordance with due process in light of *Lawrence, supra,* 44 Cal.4th 1181 and *Shaputis, supra,* 44 Cal.4th 1241, and in light of the existing record and any new evidence of Anderson's in prison conduct since the April 3, 2008 hearing.

This opinion is final as to this court immediately.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Dondero, J.